**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
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| Implementation of the Pay Telephone | ) | CC Docket No. 96-128 |
| Reclassification and Compensation Provisions | ) | |
| of the Telecommunications Act of 1996 | ) | |
| | ) | |

# COMMENTS OF AT&T INC., BELLSOUTH TELECOMMUNICATIONS, INC., AND THE VERIZON TELEPHONE COMPANIES ON FLORIDA PUBLIC TELECOMMUNICATION ASSOCIATION'S PETITION FOR A DECLARATORY RULING

## INTRODUCTION AND SUMMARY

The Commission should dismiss or deny the Petition for Declaratory Ruling filed by the Florida Public Telecommunication Association ("FPTA") on January 31, 2006. The FPTA petition seeks to raise the same issues as the petitions filed on July 30, 2004, by the Illinois Public Telecommunications Association ("IPTA"), on November 9, 2004, by the Southern Public Communication Association ("SPCA"), and on December 29, 2004, by Independent Payphone Association of New York ("IPANY"). Like those other state associations, FPTA seeks refunds for payphone line charges paid by its members from April 15, 1997, through the effective date of current rates. Refunds are not appropriate because the rates in effect since 1997 were properly approved by the Florida Public Service Commission ("FPSC" or "Florida commission") under this Commission's precedents, and it is too late to retroactively alter those rates.

**I.** FPTA's claim is barred by res judicata. The Florida commission squarely rejected FPTA's claim in the 2004 order[1] of which FPTA now complains. FPTA attempted to file an appeal in the Florida Supreme Court, but since the appeal was around two weeks late, the Florida Supreme Court properly dismissed the appeal as untimely. Under Florida law, the Florida commission's 2004 order is now final, unappealable, and entitled to res judicata effect. FPTA is thus barred from pursuing any further attacks on the Florida commission's denial of refunds based on BellSouth's post-1997 rates.

**II.** All of the reasons counseling denial of the petitions from IPTA and SPCA apply here as well.[2] The Commission established a system whereby basic payphone line rates would be tariffed exclusively in the states, giving state commissions primary responsibility for administering the Commission's pricing rules. The Florida commission has administered those rules. The Commission should not entertain collateral challenges to state commission rulings, let alone rulings that are final and unappealable.

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[1] Final Order on Arbitration of Complaint, *Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariffs for pay telephone access services (PTAS) rate with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association*, Docket No. 030300-TP, Order No. PSC-04-0974-FOF-TP (Fla. PSC Oct. 7, 2004) ("Florida Order"), *available at* http://www.floridapsc.com/apps/dockets/cms/docketFilings2.aspx?docket=030300.

[2] *See* Comments of BellSouth Telecommunications, Inc., SBC Communications, Inc., and the Verizon Telephone Companies on Independent Payphone Association of New York's Petition for an Order of Preemption and Declaratory Ruling, CC Docket No. 96-128 (FCC filed Jan. 18, 2005); Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies on Southern Public Communication Association's Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Dec. 10, 2004); Comments of BellSouth Telecommunications, Inc., SBC Communications, Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association's Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Aug. 26, 2004) ("Comments on IPTA Petition"); Reply Comments of BellSouth Telecommunications, Inc., SBC Communications, Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association's Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Sept. 7, 2004) ("Reply Comments on IPTA Petition").

**III.** Although the Commission should not address the merits of FPTA's claim, the Florida commission's determination that FPTA's claim for refunds was barred, is plainly correct under the circumstances. FPTA's claim was barred by Florida law, in that it improperly requested that the Florida commission overturn a final administrative order and grant a retroactive refund. BellSouth was not obligated by any of this Commission's previous *Payphone Orders* to issue refunds, as FPTA erroneously contends.

**IV.** The FPTA's allegations regarding BellSouth's eligibility for per-call compensation should be ignored for the reasons discussed in our earlier comments addressing the IPTA petition.[3] FPTA is not an appropriate party to raise this issue, and its arguments are, in any event, without merit.

## BACKGROUND

Following the Commission's Payphone Orders in 1996 and 1997,[4] the FPSC issued an order on August 11, 1998,[5] in which it found that BellSouth's existing tariffs for payphone line services were cost-based, consistent with Section 276 of the Telecommunications Act of 1996, and non-discriminatory. In particular, the FPSC specifically held that, "based on our review of these studies, we believe that these LECs' current tariffed rates for intrastate payphone services

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[3] *See* Comments on IPTA Petition at 17-20; Reply Comments on IPTA Petition at 10.

[4] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996); Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233 (1996) ("*Order on Reconsideration*"); Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21370 (1997) ("*Bureau Refund Order*").

[5] *See* Notice of Proposed Agency Action Order Approving Federally Mandated Intrastate Tariffs for Basic Payphone Services, Docket No. 970281-TL, Order No. PSC-98-1088-FOF-TL (Fla. PSC Aug. 11, 1998) ("1998 Florida Order"), *available at* http://www.floridapsc.com/library//FILINGS/98/08517-98/98-1088.ORD.

are cost-based and thus meet the 'new services' test." 1998 Florida Order at 5; *see also id.* at 6 ("We have considered the requirements of the FCC Orders and Section 276 of the Act and find the existing tariffs for LEC payphone services are appropriate."). Although the FPTA initially protested that order, it subsequently withdrew the protest, and the FPSC's order became final and unappealable on January 19, 1999. *See* Florida Order at 4.

The FPTA paid BellSouth's tariffed rates without further protest for more than four years. Then, on March 26, 2003, the FPTA filed the petition that led to the proceeding at hand. In that petition, FPTA asked that the FPSC consider whether BellSouth's tariffed payphone rates met the "new services test," and if not, whether to order a refund for amounts collected after April 15, 1997. *Id.* at 4. BellSouth subsequently filed a voluntary revision to its General Subscriber Services Tariff to reduce its approved and effective pay telephone access service ("PTAS") rates by the amount of the federal end-user common line charge, on October 27, 2003. *Id.* at 5. FPTA persisted, however, in its claim that BellSouth had been obligated to reduce its intrastate payphone line rates by the amount of the federal end-user common line charge ("EUCL") after April 15, 1997, and that BellSouth should therefore be ordered to award retroactive refunds for a six-year time period beginning on that date.

The FPSC rejected FPTA's claims. *First*, the FPSC held that there "is no FCC requirement obligating BellSouth to 'voluntarily' or automatically change its payphone rates upon a change in costs, absent Commission review." *Id.* at 7. Because there was no challenge or appeal to the 1998 order, "the tariffed rates that BellSouth had in place at that time were the rates that were in effect and the rates that BellSouth was authorized and required to charge." *Id.* Thus, "[a]ny reductions must occur on a going-forward basis when this Commission reviews a BOC's payphone line rates for NST compliance." *Id.*

*Second*, the FPSC held that FPTA could not gain any refund whatsoever, particularly because the 1998 order had gone "into effect as a final Order," and even though FPTA "was a party to the proceedings and had the opportunity to challenge" the order, it "decided not to challenge our orders in any forum, and for years its members have paid the rates that are set forth in BellSouth's filed tariffs." *Id.* at 13. "In seeking refunds, the FPTA indisputably is seeking relief for the payment of rates that were (and are) on file with this Commission," and that "were (and are) consistent with unchallenged orders entered by this Commission." *Id.* The FPSC then noted that retroactive refunds in this case would be inconsistent with a long line of Florida cases holding that "'orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification.'" *Id.* at 13-14 (quoting *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966)).

The FPTA had relied on the 1997 waiver letter that the Bell Operating Companies ("BOCs") submitted to the FCC (*i.e.*, in which the BOCs agreed, in exchange for a limited waiver extending the time to file tariff revisions, to make any rate reductions effected by those new tariffs (which had to be filed by May 19, 1997) effective on April 15, 1997. But the FPSC held that FPTA's reliance on the 1997 waiver letter was inconsistent both with the "controlling legal principles" of Florida law, and with the New York decision in *Independent Payphone Association of New York, Inc. v. Public Service Commission*, 774 N.Y.S.2d 197 (App. Div. 2004). Florida Order at 14. The Florida commission rejected FPTA's argument that, in filing the 1997 waiver letter, BellSouth had promised that, even after the Florida commission's 1998 order "became effective, and even after all parties declined to seek reconsideration or appeal such orders, BellSouth would agree to pay refunds, all the way back to April 15, 1997, if any person or entity could, at any unspecified time in the future, convince any commission or court

that the Florida Commission really should have established different rates way back in 1999." *Id.*

*Third*, as to BellSouth's current rates, the FPSC found, after considering extensive cost studies and testimony from expert witnesses on both sides, that "BellSouth's rates remain compliant with the NST," and that BellSouth had properly "updated and revised inputs to its underlying models which are reflected in the PTAS Study in this proceeding." *Id.* at 19. The FPSC made one prospective modification (*i.e.*, ordering an overhead loading factor that was approximately halfway between the factors proposed by BellSouth and FPTA), in order to be consistent with this Commission's *ONA Tariff Order*. *See id.* at 20-21. The FPSC concluded its order by noting once again that "[b]etween April 15, 1997 and November 10, 2003, the rates charged by BellSouth to the PSPs were legally sustainable, and were consistent with BellSouth's tariffs and controlling orders of this Commission." *Id.* at 23.

Finally, the FPSC included a "Notice of Further Proceedings or Judicial Review," in which it reminded the parties that any notice of appeal "must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure." *Id.* at 24.

The FPTA waited until November 22, 2004, to file a notice of appeal with the Florida Supreme Court (*see* Attachment 1 hereto). Because this appeal was taken more than 30 days after the Florida Order's issuance on October 7, 2004, the Florida Supreme Court dismissed FPTA's appeal for lack of timeliness. *See* Order, *Florida Public Telecommunications Ass'n, Inc. v. Deason*, Case No. SC04-2271 (Fla. Dec. 6, 2004) (Attachment 2 hereto).

## ARGUMENT

As noted above, BellSouth, SBC, and Verizon have already filed comments and reply comments in response to the earlier petitions for declaratory ruling filed by IPTA, SPCA, and IPANY. FPTA raises no new legal arguments, but instead reiterates points already discussed by other petitioners. We incorporate by reference our earlier comments and reply comments, which are already a part of this docket. *See supra* note 2. We thus focus on the particular faults of FPTA's petition.

## I. FPTA's PETITION IS BARRED BY RES JUDICATA

FPTA's petition seeks a declaration that its members are entitled to refunds of payphone charges paid after April 15, 1997. But the Florida commission has already rendered a judgment on that claim, and the Florida Supreme Court dismissed FPTA's appeal. These are final judgments not subject to collateral attack. Accordingly, FPTA cannot relitigate it before this Commission.

**A.** "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1979) (internal quotation marks omitted). "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Id.* (citations omitted).[6] Under Florida law as well, "a judgment on the merits bars a subsequent

[6] Here, there is no question that FPTA was a party to the earlier litigation; nor can there be any dispute that the Florida courts had jurisdiction in the earlier case. Nor is there any dispute that FPTA seeks to pursue precisely the same claim that was rejected both by the Florida commission and by the Florida Supreme Court – *i.e.*, for refunds of amounts paid under pre-existing state tariffs.

action between the same parties on the same cause of action." *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003). Res judicata "bars relitigation in a subsequent cause of action not only of claims raised, but also claims that *could have been raised*." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (emphasis added) (citing *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001)). "The idea underlying res judicata is that if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again . . . ." *Id.* (citing *Denson v. State*, 775 So. 2d 288, 290 n.3 (Fla. 2000)).

Under Florida law, an FPSC decision has res judicata effect, including in circumstances where it has not been appealed at all. *See, e.g.*, *Florida Power Corp. v. Garcia*, 780 So. 2d 34, 42 (Fla. 2001) (holding that "the PSC's prior, unappealed ruling regarding its jurisdiction to entertain the controversy addressed in FPC's petitions – even if erroneous – operates as a bar to a subsequent determination of that jurisdiction over the same claim") (footnote omitted); *Florida Power Corp. v. State, Siting Bd.*, 513 So. 2d 1341, 1344 (Fla. Ct. App. 1987) (holding that a decision "by the PSC may only be reviewed if appealed within thirty days from the issuance of the order," and that "[o]nce the thirty-day time period has expired, as it has here, such determination is res judicata and binding on all further proceedings"). Given that the 2004 order is now final and unappealable under Florida law, it must be given res judicata effect.[7]

As the Supreme Court has said, a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in

[7] Indeed, the unappealed 1998 order should also be treated as res judicata for the time when it was in effect. When FPTA now demands a refund for 1997 and 1998, for example, it is specifically seeking to relitigate the question of the legality of BellSouth's 1997 and 1998 rates, even though that question was determinatively resolved in the 1998 Florida Order.

other words, *the judgment of the rendering State gains nationwide force*." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (emphasis added; footnote omitted). Likewise, the Supreme Court has held that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, . . . federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts." *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (internal quotation marks omitted). FPTA's refund claim is therefore dead.

**B.** It does not matter that the Commission was not a party to the earlier proceeding and that it therefore is not subject to the judgments of the Florida commission or the Florida Supreme Court. FPTA asks the Commission to act in a quasi-adjudicatory capacity by declaring the FPTA has a right to a refund if the FPSC determined that BellSouth's rates in effect on April 15, 1997 were not compliant with the new services test. In that capacity, this Commission cannot permit a collateral attack on a prior judgment. *See, e.g., Puerto Rico Maritime Shipping Auth. v. Federal Maritime Comm'n*, 75 F.3d 63, 66 (1st Cir. 1996); *see also NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 35 (1st Cir. 1987) (NLRB cannot evade effect of prior judgment, even in enforcement action, where dispute was effectively between private parties). As the Federal Circuit has observed, "the same principles of judicial efficiency which justify application of the doctrine of collateral estoppel in judicial proceedings also justify its application in quasi-judicial proceedings." *Graybill v. United States Postal Serv.*, 782 F.2d 1567, 1571 (Fed. Cir. 1986) (citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3d Cir. 1981)); *cf. Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, 125 F.3d 18, 21 (1st Cir. 1997) (noting that "federal agency is normally bound to respect findings by another agency

acting within its competence" and that "the tendency is plainly in favor of applying collateral estoppel in administrative contexts").

## II. THE MERITS OF A PARTICULAR STATE COMMISSION'S RESOLUTION OF AN INDIVIDUAL COMPLAINT IS NOT AN APPROPRIATE SUBJECT FOR A DECLARATORY RULING

We have already explained that the Commission has "broad discretion" in deciding whether to issue a declaratory ruling,[8] and that the exercise of that discretion to review individual state commission orders regarding payphone access line rates would be inappropriate for two reasons. First, the Commission has determined that state commissions are responsible for ensuring that state payphone line rates conform with the requirements of 47 U.S.C. § 276; only if states are unable to carry out that function will the Commission take over that role.[9] Second, the determination of a state commission as to the appropriate relief to grant to a particular litigant in a particular case necessarily depends on the facts and circumstances of a particular claim. For that reason, such claims require "case-by-case" consideration, something that is inappropriate for a declaratory ruling proceeding of this kind.[10] *See* Comments on IPTA Petition at 8-10.

The FPTA petition further illustrates both of these points. As we have pointed out in our earlier comments, *see id.* at 12-15, by determining that basic payphone line rates should continue to be tariffed in the states, rather than at the federal level, the Commission necessarily understood that any proceedings for enforcement of federal requirements would take place

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[8] Order, *Petition of Home Owners' Long Distance, Inc. for a Declaratory Ruling*, 14 FCC Rcd 17139, 17145, ¶ 12 (CCB 1999).

[9] *See Order on Reconsideration*, 11 FCC Rcd at 21308, ¶ 163; Memorandum Opinion and Order, *Wisconsin Public Service Commission; Order Directing Filings*, 17 FCC Rcd 2051, 2056, ¶ 15 (2002) ("*Wisconsin Order*"), *aff'd sub nom. New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2065 (2004)..

[10] Memorandum Opinion and Order, *Omnipoint Communications, Inc., New York MTA Frequency Block A*, 11 FCC Rcd 10785, 10789, ¶ 9 (1996).

before state commissions, to be governed by state procedural rules, and with review as provided under state statute. The Florida commission did exactly what the Commission asked of it. In 1998, the commission reviewed cost studies and expert testimony presented by the parties, and then concluded that BellSouth's "current tariffed rates for intrastate payphone services are cost-based and thus meet the 'new services' test." 1998 Florida Order at 5; *see also id.* at 6 ("We have considered the requirements of the FCC Orders and Section 276 of the Act and find the existing tariffs for LEC payphone services are appropriate."). As shown by the 2004 order, the Florida commission remained ready and willing to entertain claims about the lawfulness of BellSouth's tariffed rates, and that commission gave FPTA all of the relief that it was entitled to receive. It would therefore violate principles of comity and preclusion, and go against the Commission's own prior orders, for the Commission to interfere with the Florida commission's decisions.

Moreover, as the FPSC rightly concluded, there is "no FCC requirement obligating BellSouth to 'voluntarily' or automatically change its payphone rates upon a change in costs, absent Commission review," Florida Order at 7, let alone in such a way that would require retroactive refunds. There is no claim that that the FPSC failed to provide a forum for FPTA's claims, or that there is any need for the FCC to provide further clarification of its rules. In these circumstances, there is no basis for intervention by this Commission.

Furthermore, the FPSC's decision here depends entirely on the application of general ratemaking principles to the particular circumstances of the litigation before that state commission, not to any determination regarding application of the new services test pricing standard. After the 1998 order was finalized, the FPTA was free at that time or any time thereafter to pursue its argument that the 1997 tariff was inconsistent with the new services test.

It failed to do so. Indeed, it expressly abandoned its objections to the Florida commission's order, and then paid BellSouth's tariffed rates without protest for more than four years. *See* Florida Order at 13 (noting that FPTA "was a party to the proceedings and had the opportunity to challenge" the order, but it "decided not to challenge our orders in any forum, and for years its members have paid the rates that are set forth in BellSouth's filed tariffs"). Thus, as the Florida commission correctly observed, "[i]n seeking refunds, the FPTA indisputably is seeking relief for the payment of rates that were (and are) on file with this Commission," and that "were (and are) consistent with unchallenged orders entered by this Commission." *Id.* That is, FPTA initiated a new proceeding exclusively for the purpose of seeking a refund of amounts paid under an approved tariff that it had failed to challenge in the proceeding that approved it. The Commission need not address, whether there is any basis to such a claim under such circumstances, or to similar claims raised under the circumstances present in any particular state.

## III. THE FPSC'S DETERMINATION WAS PLAINLY RIGHT IN ANY EVENT

Although the Commission should not address the merits of FPTA's petition for the reasons already discussed, it is plain from the text of the Florida Order and FPTA's petition that the FPTA's challenge is without merit.

**A.** As the Florida commission rightly emphasized, all of the charges that FPTA's members seek to recover were paid pursuant to a valid tariff that was reviewed and approved by the Florida commission. *See* Florida Order at 13. Indeed, in such circumstances, had *BellSouth* determined that the rate was inadequate, it could not have applied for a rate increase to make up past losses. *See id.* at 7 (noting that "the tariffed rates that BellSouth had in place at that time were the rates that were in effect and the rates that BellSouth was authorized and *required* to charge") (emphasis added). By the same token, however, the state commission had no authority

to reach back and modify the rates established in the 1997 tariff merely because FPTA now claims that they were too high. Rather, because ratemaking is a legislative function, any change in rate would have to be prospective. This is true as a matter of state law and under federal ratemaking principles as well. *See Southern Bell Tel. & Tel. Co. v. Florida Pub. Serv. Comm'n*, 453 So. 2d 780, 784 (Fla. 1984) ("[W]e believe that any such adjudication must be given prospective effect only. To hold otherwise would violate the principle against retroactive ratemaking."); *City of Miami v. Florida Pub. Serv. Comm'n*, 208 So. 2d 249, 259 (Fla. 1968) ("[T]he Commission would have no authority to make retroactive ratemaking orders."); *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966) ("[O]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein.") (cited at Florida Order at 13); *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932).

The filed rate doctrine leads to the same result. BellSouth's charges were governed throughout the relevant period by its 1997 tariff, which was reviewed and affirmatively approved by the FPSC. BellSouth was obligated to charge, and its customers were obligated to pay, those rates and no others. The independent payphone providers had the opportunity to seek reconsideration of the order approving the tariff or to seek judicial review. They did neither. Instead, they waited several years to file a collateral attack on the FPSC's 1998 order. The filed rate doctrine forbids such a strategy. *See Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 615-16 (11th Cir. 1995).

**B.** FPTA does not present any reason to disturb the Florida commission's determination that, under Florida law, its approval of BellSouth's 1997 rates was final. *See* Florida Order at 13-14. Instead, FPTA argues that the *Wisconsin Order* requires the Florida commission to entertain FPTA's claim for refunds. *See* FPTA Petition at 10. That argument fails, because the *Wisconsin Order* had nothing to do with any obligation to provide refunds for amounts paid under prior rates. Instead, the *Wisconsin Order* articulated a particular pricing standard under the rubric of the "new services test" that state commissions would be required to apply in evaluating BOCs' payphone line rates. But the FPTA does not question that BellSouth's current rates comply with the new services test. Accordingly, there is nothing further that the FPSC needs to do to enforce those requirements.

FPTA also suggests that the Florida commission's order denies the preemptive effect of the *Wisconsin Order, see* FPTA Petition at 11, but that is a misreading of the order. The Florida commission specifically found that the "language of the *Wisconsin Orders* suggests that a state commission's review and implementation . . . should be prospective in nature." Florida Order at 7. As we have explained briefly above and at length in our earlier comments, *see* Comments on IPTA Petition at 12-17, that conclusion is correct, both with respect to the *Wisconsin Order* and with regard to the Commission's earlier orders in this proceeding. Moreover, the *Wisconsin Order* made clear that due to the "interest[s] of federal-state comity," state commissions, not the Commission, should "ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276." *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 15. The Florida commission was therefore carrying out its duties under this Commission's orders when it held that the FPTA was limited to prospective relief. Given the

absence of any inconsistencies between the FPSC's denial of refunds and the Commission's regulations, there is no basis for preemption.

**C.** Nor is there any merit to the claim that BellSouth has somehow waived its defenses to FPTA's refund claim. *First*, the FPTA claims that BellSouth's reduction in its PTAS rates was a tacit admission that it had been out of compliance with the Commission's new services test. FPTA Petition at 9-10, 11. This claim is without precedential support and is wrong. BellSouth's filing of new tariffed rates is immaterial to the question whether FPTA may demand a refund of charges paid under a valid tariff. The Florida commission denied FPTA's claim not because the 1997 tariff fully anticipated the requirements articulated in the *Wisconsin Order*, but because the state commission has no power to grant the type of retroactive relief that FPTA sought. Indeed, if the voluntary filing of a tariff could impose a refund requirement – when modification after a contested proceeding would not – no carrier would ever voluntarily update its tariff to reflect new developments.

*Second*, the FPTA claims that this Commission's *Bureau Refund Order* "expressly and unambiguously conditioned entitlement to the limited waiver . . . on the later refund or credit of any line charges . . . ." FPTA Petition at 5; *id.* at 8 (arguing that a refund is required under the "express terms of the *Bureau Refund Order*"); *id.* at 11 (same). We have addressed these arguments before. *See* Reply Comments on IPTA Petition at 7-10. As we have explained, the RBOC Coalition's only commitment was to reimburse the difference between newly filed tariffs (*i.e.*, tariffs filed pursuant to the waiver order) and the tariff in effect on April 15, 1997. *See id.* at 8-9. The *Bureau Refund Order* simply reiterates the RBOC Coalition's voluntary commitment, limited in both relevant respects. *See* 12 FCC Rcd at 21376, ¶ 14, 21379-80, ¶ 20 (requiring reimbursement only from BOCs that "seek[] to rely on the waiver" and only "in

situations where the newly tariffed rates are lower than the existing tariffed rates"). BellSouth did not seek to rely on the waiver, because it did not have to file new tariffs at all, because, as the Florida commission held, BellSouth's existing rates were consistent with all requirements of federal law, including the "new services test." *See* 1998 Florida Order at 6-7. The commitment under the waiver letter – which could never create the sort of obligation that FPTA attempts to impose in any event – is not implicated here at all.

## IV. THE COMMISSION SHOULD DENY FPTA'S REQUEST FOR A DECLARATION CONCERNING BELLSOUTH'S ELIGIBILITY FOR PAYPHONE COMPENSATION

FPTA's petition briefly contends that BellSouth has been "unjustly enriched" by the collection of "tens of millions of dollars in dial around compensation." FPTA Petition at 8-9; *id.* at 12 (same). To the extent that FPTA is seeking a declaration concerning BellSouth's eligibility for per-call compensation, its petition, like IPTA's petition on the same subject, should be denied. Like IPTA, FPTA does not claim to have paid per-call compensation and evidently raises this issue simply to gain leverage over BellSouth. Given FPTA's lack of standing, the Commission should exercise its discretion to dismiss its claim unaddressed.

In all events, BellSouth satisfied all of the requirements for eligibility for per-call compensation. *See Order on Reconsideration*, 11 FCC Rcd at 21293-94, ¶¶ 131-32. BellSouth had appropriate payphone service tariffs on file, and those tariffs were approved by the Florida commission. As discussed above, the Florida commission's approval of those rates was never challenged or appealed, and has long since been final under Florida law. Nothing more was required for BellSouth to comply with the eligibility requirements contained in the Commission's orders.

## CONCLUSION

The Commission should deny the petition.

Respectfully submitted,

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February 28, 2006